In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 685

HERMAN A. PINEDO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner and his wife were convicted on pleas of guilty to a three-count indictment charging them with wilfully attempting to evade income taxes owed for the years 1956, 1957 and 1958 by filing false and fraudulent returns, in violation of Section 7201 of the Internal Revenue Code of 1954 (R.I. 2–5).[1] Petitioner was sentenced to a three-year term of imprisonment on each count, the sentences to run concurrently; his wife received the same sentence, but execution of her sentence was suspended and she was placed on probation (R.I. 12).

[1] The record is in two volumes which are represented by "R.I." and "R.II."

794—887—65

Approximately one-and-one half months after sentence was pronounced, petitioner moved under Rules 32(d) and 35 of the Federal Rules of Criminal Procedure to withdraw his plea of guilty and to correct his sentence (R.I. 14–16). He contended that he was innocent, that he had been incompetently represented by counsel at the time of his original plea, and that he had signed a petition to enter a guilty plea without reading or understanding it. The district judge conducted a hearing during which he heard testimony from petitioner, his wife, the accountant who prepared his tax returns, the attorney who had represented him when he pleaded guilty, and an Internal Revenue Agent (R.II. 5–157). The court then denied the motion (R.II. 170). The court of appeals affirmed on June 18, 1965, 347 F. 2d 142 (Pet. App. 1–13), and denied a petition for rehearing on September 21, 1965 (R.I. 88).

This case presents no issue warranting review by this Court. After a thorough hearing the district court concluded that there had been no "manifest injustice" justifying the relief authorized after sentence by Rule 32(d). Petitioner's attorney testified at the hearing that the United States Attorney had made no promises before sentencing (R.II. 50–52) and that counsel had advised petitioner that the judge could impose a prison sentence if he wanted to do so (R.II. 66). Petitioner's surprise at the severity of the sentence did not entitle him to withdraw the plea upon which it was based. See, *e.g.*, *Williams* v. *United States*, 192 F. 2d 39, 40 (C.A. 5); *United States* v. *Shneer*, 194 F. 2d 598, 600 (C.A. 3); *Ridgeway* v.

United States, 205 F. 2d 680 (C.A. 6); *United States* v. *Parrino*, 212 F. 2d 919, 921 (C.A. 2). Nor was any convincing testimony offered at the hearing to establish that petitioner was innocent—assuming, *arguendo*, that such evidence bears upon whether the former plea resulted in "manifest injustice." Petitioner admitted that he had realized profit during the years involved (R.II. 106–107); his only defense was that his wife had covered the tax returns when she gave them to him to sign (R.II 117, 153).

The court of appeals carefully reviewed the record and agreed with the district court's evaluation of the facts. No further consideration by this Court is required.[2] We respectfully submit that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

RICHARD M. ROBERTS,
Acting Assistant Attorney General.

JOSEPH M. HOWARD,
JOHN M. BRANT,
Attorneys.

NOVEMBER 1965.

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[2] Petitioner's claim that he is entitled to correction of sentence under Rule 35 because his counsel was incompetent is unsound. Rule 35 pertains to the correction of sentences which exceed statutory limits or are otherwise illegal on their face. See *United States* v. *Morgan*, 346 U.S. 502, 505–506; *Heflin* v. *United States*, 358 U.S. 415, 418, 422; *Hill* v. *United States*, 368 U.S. 424, 430.

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